In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1196

JOSEPH DATLOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was president, treasurer and a member of the board of directors of Donchester Manufacturing Company, a corporation engaged in the manufacture of clothing (Pet. 45; R. 437A, 443A).[1] Federal income and F.I.C.A. taxes were withheld from the wages of the corporation's employes, but not all of these withheld taxes were paid over by the corporation to the government (R. 437A). On September 30, 1957, the Commissioner of Internal Revenue, acting under

[1] "R." references are to the appendix to the brief for petitioner in the court of appeals; "Supp. R." references are to Appendix B to the brief for the government.

Section 6672 of the Internal Revenue Code of 1954,[2] made an assessment against petitioner in respect of the employees' withholding and F.I.C.A. taxes which were not paid over during the last three quarters of 1955. Petitioner paid $81.90 of the assessment and brought suit for a refund thereof. The government counter claimed for $31,499.45, which represented the unpaid balance of the assessment (Pet. 44–45; R. 438A). After trial the district court, sitting without a jury, found that petitioner was an officer of the corporation responsible for collecting, truthfully accounting for and paying over the withheld taxes and that he collected and accounted for such taxes but willfully failed to pay them over (Pet. 45). The district court also held that the amount of the assessment against petitioner was correct (R. 477A–479A).

The court of appeals affirmed (Pet. 44–51). It held that the district court's findings were supported by "substantial evidence * * *. They were far from being clearly erroneous" (Pet. 45). It concluded that petitioner's contention that the Internal Revenue

[2] That section, 26 U.S.C. 6672, provides as follows:

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

Service did not use due diligence in collecting from the corporation the taxes upon which the assessment was based provided no ground for his prevailing as to his Section 6672 liability (Pet. 46). It further held that the district court properly refused to reduce the amount of the assessment against petitioner (Pet. 46-51).

1. Section 6672 of the Internal Revenue Code provides that a corporate officer who willfully fails to pay over to the government income and social security taxes which the corporation has withheld from the wages of its employees shall be "liable to a penalty equal to the total amount of the tax * * * not collected, or not accounted for and paid over." The concurrent findings of the two courts below that petitioner was the person responsible for paying over the withheld taxes and that he willfully failed to do so are amply supported by the evidence and do not warrant further review. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214; *Rudolph* v. *United States,* 370 U.S. 269, 271.

Petitioner argues that he was not a person responsible for paying over the withheld taxes because he was "only a puppet" and had no power to disburse corporate funds (Pet. 39). This argument presents only a factual question which was resolved against petitioner by the district court, and its determination in this regard was upheld by the court of appeals. Petitioner's power to control the finances of the corporation is apparent from the fact that, during the period in question, he disbursed corporate funds total-

ing $108,072.09 by drawing 174 checks bearing his signature alone (R. 461A). Petitioner's further assertion (Pet. 36–38) that his failure to pay over the withheld taxes was not willful because he did not know such taxes had not been paid until the corporation had no funds of its own with which to pay the taxes is also factually incorrect. The district court noted that when petitioner was first informed that the corporation was delinquent in the payment of its taxes, the taxes here in question were not yet due (R. 452A). Thus, when he later disbursed substantial corporate funds to creditors other than the United States, he did so knowing that the taxes for the last three quarters of 1955 were unpaid, and therefore his failure to pay over the withheld taxes was willful within the meaning of Section 6672. *Bloom* v. *United States* 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803; *Frazier* v. *United States,* 304 F. 2d 528 (C.A. 5).

2. Petitioner contends that the Internal Revenue Service did not exercise due diligence in collecting the withheld taxes from the corporation and that the district court erred in refusing proffered evidence in this connection (Pet. 41). The penalty imposed by Section 6672 is separate and distinct from the tax in respect of which it is imposed. The only significant connection between the two is that the latter determines the amount of the former.[3] *Bloom* v. *United*

[3] Since the amount of the unpaid tax determines the amount of the Section 6672 penalty, no "double penalty" is imposed upon amounts which a responsible officer willfully fails to pay over but which are later collected from the corporation. *United States* v. *Molitor*, 337 F. 2d 917, 924 (C.A. 9).

States, supra, at 221; *Rosenberg* v. *United States,* 327 F. 2d 362, 364–365 (C.A. 2). It is well settled that a responsible officer cannot avoid the Section 6672 penalty on the ground that the government failed to look first to the corporation for payment of the withheld taxes. *Spivak* v. *United States,* 370 F. 2d 612 (C.A. 2), petition for certiorari pending, No. 1205, 1966 Term; *Kelly* v. *Lethert,* 362 F. 2d 629 (C.A. 8); *Cash* v. *Campbell,* 346 F. 2d 670 (C.A. 5). See *Phillips* v. *Commissioner,* 283 U.S. 589. *Tozier* v. *United States* (W.D. Wash.), decided April 13, 1965 (65–2 U.S.T.C., par. 9621), relied upon by petitioner, is not to the contrary, but rather, as pointed out by the district court (R. 486A), is plainly distinguishable on its facts. Therefore, the alleged lack of diligence of the Internal Revenue Service in collecting the withheld taxes from the corporation,[4] and petitioner's proffered evidence in respect thereto, are irrelevant.

3. Finally, as the court of appeals concluded, the amount of the judgment entered against petitioner is correct. The Donchester Manufacturing Company owed three taxes for each quarter of 1955, totalling $77,156.74 (Pet. 47):

Employer's two percent F.I.C.A. tax,

[4] The record shows that petitioner's allegation of lack of due diligence on the part of the Internal Revenue Service is unfounded. Before the corporation ceased operating, petitioner repeatedly requested the Service not to collect the tax from the corporation (R. 454A–455A). After the corporation ceased operating, all of its assets were subject to a chattel mortgage and landlord's levy, both of which were arranged by petitioner (R. 463A–464A). Therefore, there were no assets of the corporation from which the Service could have collected the withheld taxes.

Employees' federal income withholding tax, and

Employees' two percent F.I.C.A. tax.

Fourteen payments aggregating $39,910.20 were received from Donchester between March of 1955 and April of 1957 toward the above taxes. The Internal Revenue Service applied each of the payments to the total sum of all three taxes due for each quarter, with the exception of portions of three of the fourteen payments applied to miscellaneous items totalling $457.56.[5] The net effect of the Service's application of the fourteen payments was to liquidate the entire amount owned for the combined three taxes for the first quarter of 1955, the employer's tax for each of the last three quarters, and part of the employees' withholding and F.I.C.A. taxes for the last three quarters. This left $37,704.10 in employees' withholding and F.I.C.A. taxes unpaid. From this amount was subtracted $6,204.65, representing three payments made after the date of assessment, September 30,

[5] These miscellaneous items were as follows: Interest on unpaid taxes to March 1, 1956, $80.97 (Supp. R. 5b); expenses incurred in the seizure and sale of corporate assets, $47.25 (advertising) and $324.34 (storage and handling) (Supp. R. 2b); and a penalty of $5 in respect of a check for $486.88 returned unpaid (R. 3b). Section 6601(a) imposes interest at the rate of six percent per annum on unpaid taxes. Section 6342 authorizes application of money received from the sale of seized property to the expenses of levy and sale. (Some of the "payments" were the proceeds of the sale of the corporation's assets.) Section 6657 provides that if a check for less than $500 in payment of a tax is returned unpaid, a penalty shall be imposed in the amount of $5 or the amount of the check, whichever is the lesser. Thus, each of these miscellaneous items was assessed against the corporation as authorized by statute.

1957,[6] leaving unpaid employees' withholding and F.I.C.A. taxes of $31,499.45. Since taxpayer was liable for a penalty in the amount of employees' withholding and F.I.C.A. taxes not paid over under Section 6672, judgment was entered against him in that amount (Pet. 46–49).

Petitioner argues that the amount of the judgment is incorrect in that $12,511.17 credited by the Service to unpaid employer's F.I.C.A. taxes for all quarters of 1955, for which he is not responsible under Section 6672, should have been credited instead to unpaid employees' withholding and F.I.C.A. taxes, for which he is responsible under Section 6672 (Pet. 27–36). The court of appeals held that this argument, as made in connection with application of taxes for the first quarter of 1955, was without merit, since the taxes for that quarter had been paid by the corporation and liability therefor was discharged at the corporation's request. No assessment was made against petitioner in respect of that quarter, and thus it was not before the court (Pet. 49). The court below also pointed out that if the Service had applied the payments in the manner for which petitioner contends, the maximum amount by which the judgment could have been reduced was $5,212.85 (Pet. 49–50). The court of appeals held, however, that there was no basis for requiring the Service to apply funds in that manner since, as a matter of fact, petitioner had accompanied

[6] For example, the payment of $81.90 which petitioner here seeks to recover was made after the date of assessment and therefore is included in this amount of $6,204.65 (Pet. 48).

the payments with no request or direction as to their application, with the single exception that one payment was accompanied by a request that it be applied to a quarter for which tax liability had already been discharged. Because there was no tax owing for the quarter as to which petitioner directed application, that payment was applied to a subsequent quarter. Since petitioner made no request as to the application of the other payments, the Service could apply them as it wished. *Gemological Institute of America* v. *Riddell,* 149 F. Supp. 137 (S.D. Calif.); *United States* v. *Ragsdale,* 206 F. Supp. 613 (W.D. Tenn.). Petitioner's reliance on *Tozier* v. *United States, supra,* (Pet. 34–35) is misplaced, since the court there held that the taxpayer was not responsible for the unpaid taxes of the corporation. Any consideration which the court there gave to the application of payments by the Service in determining the amount of taxes for which the taxpayer might be responsible was therefore *dictum.*

The holding of the court below is correct and there is no conflict of decisions.[1] For the reasons stated, the petition should be denied.

Respectfully submitted,

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[1] Petitioner alleges that there is a conflict between the decisions in *United States* v. *Slattery*, 224 F. Supp. 214 (E.D. Pa.), affirmed *per curiam*, 333 F. 2d 844 (C.A. 3), and *Bloom* v. *United States*, *supra*, and, inferentially, between those cases and the holding here (Pet. 26). The court in *Slattery* specifically followed the decision in *Bloom* (224 F. Supp., at 217), as did both courts below in the instant case (Pet. 46; R. 482A, 484A). The different results reached in *Slattery* and *Bloom* are due to factual distinctions present in those two cases.

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